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8
9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**

11 GARY W. McCLAIN,

12 Plaintiff,

13 vs.

14 CLARK COUNTY, a political subdivision
of the State of Nevada,

15 Defendant.
16

Case No: 2:10-cv-2117-LDG-LRL

17 **REQUEST FOR EXCEPTION FROM**
18 **ENE ATTENDANCE REQUIREMENT**

19 TO: UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA,
ROBERT J. JOHNSTON, United States Magistrate Judge;

20 TO: GARY McCLAIN, Plaintiff;

21 TO: ROBERT P. SPRETNAK, ESQ., his attorney;

22 TO: DAVID W. GUTKE, ESQ., his attorney;

23 Defendant CLARK COUNTY, through its attorney DAVID ROGER, District
24 Attorney, by LUCINDA L. COUMOU, Chief Deputy District Attorney, in accordance with
25 the Court's April 11, 2011, Order Scheduling An Early Neutral Evaluation Hearing, requests
26 exception to the attendance requirements set forth therein as follows:

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28 ///

1 Defendant CLARK COUNTY is a named party to this action. CLARK COUNTY is
 2 governed by a publicly-elected body whose actions are governed by the notice and hearing
 3 requirements of the Nevada Open Meeting Law. NRS 241.010 et seq.

4 The Order Scheduling An Early Neutral Evaluation Hearing requires that in the case
 5 of non-individual parties, a representative, with binding authority to settle this matter up to
 6 the full amount of the claim, be present in court for the duration of the ENE session. There
 7 is no individual representative of Clark County who has binding authority to settle this
 8 matter. Settlement of this matter would require a publicly noticed meeting of the Board of
 9 County Commissioners, inviting public comment, and including public discussion and a
 10 public vote of the majority of the Commissioners. The presence of the Board of County
 11 Commissioners at the ENE session would be a violation of the Nevada Open Meeting Law.

12 Defendant CLARK COUNTY therefore requests that it be granted an exception to the
 13 ENE session attendance requirements, and that it be allowed to have present at the ENE
 14 session, Les Lee Shell. Ms. Shell is a Principal Management Analyst in the Department of
 15 Finance for Defendant CLARK COUNTY and is the Clark County representative with
 16 authority to settle cases up to and including the sum of \$10,000. Ms. Shell is also the Clark
 17 County representative who makes recommendations regarding litigation settlement and/or
 18 resolution in excess of that amount, as necessary, to the Board of County Commissioners.

19 Although the ENE session pursuant to Special Order 102 is not a settlement
 20 conference, by analogy, the authority of the Court to schedule a settlement conference, found
 21 in FRCP 16(c)(9), was added with the 1993 amendments to the Federal Rules. The issue of
 22 representation by a public body defendant at a settlement conference was addressed by the
 23 Advisory Committee to the 1993 amendments. The Advisory Committee noted with regard
 24 to ordering the appearance of a governmental entity, as follows:

25 Particularly in litigation in which governmental agencies or large
 26 amounts of money are involved, there may be no one with on-the-spot
 27 settlement authority, and the most that should be expected is **access to a**
 28 **person who would have a major role in submitting a**
recommendation to the body or board with ultimate decision-making
 authority. The selection of the appropriate representative should
 ordinarily be left to the party and its counsel.

1 Advisory Committee Note to 1993 Amendments to FRCP 16(c)(9). (Emphasis added.)

2 The only individuals who can provide authority to settle for a monetary amount in
3 excess of Ms. Shell's authority, are the members of the Board of County Commissioners,
4 acting upon a majority vote of its membership. If more monetary authority is required than
5 is vested in Ms. Shell, then Ms. Shell is required to seek the authorization of the Board of
6 County Commissioners. The Board of County Commissioners can only act to provide such
7 authorization through a vote taken on a properly-noticed agenda item at a publicly-noticed
8 public meeting, which includes a period devoted to public comment and the distribution of
9 supporting documentation. NRS 241.020. Such a meeting is not conducive to the purpose
10 and scope of the ENE session, as specified in Special Order 102.

11 CONCLUSION

12 Based upon the foregoing, Defendant CLARK COUNTY requests an exception to the
13 attendance requirements for the Early Neutral Evaluation Hearing to allow the attendance of
14 Les Lee Shell, Principal Management Analyst in the Department of Finance for Defendant
15 CLARK COUNTY, as the authorized representative of Defendant CLARK COUNTY.

16 RESPECTFULLY SUBMITTED this 19th day of May 2011.

17 DAVID ROGER
18 DISTRICT ATTORNEY

19 By: Lucinda L. Coumou

20 LUCINDA L. COUMOU
21 Chief Deputy District Attorney
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28 GRANTED. IT IS SO ORDERED.

Robert Johnston
UNITED STATES MAGISTRATE JUDGE

DATE: MAY 23, 2011